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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 510

CHARLES REDCAY WARFEL, as Assignee for the Benefit of Creditors of The Hansel Company, a partnership,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,

Defendant,

and

BANK OF HAWAII,

Third Party Defendant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

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Plaintiff,

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THE UNITED STATES OF AMERICA,

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Third Party Defendant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Charles R. Warfel, as assignee for the benefit of creditors of The Haneel Company, a partnership, prays that a writ of certiorari issue to review the final judgment of the United States Court of Claims, which judgment was entered on July 9, 1951. Petition for Rehearing was timely filed before the United States Court of Claims by your petitioner and the said motion

was denied by the Court on October 2, 1951. Judgment of the United States Court of Claims was rendered in favor of the United States and the Third Party and against your petitioner who was plaintiff before that Court and the judgment held, in effect, that petitioner could not recover the amount of a check drawn by the United States of America upon the Third Party Bank of Hawaii in favor of your petitioner's assignor, which check was misappropriated by a former employee of petitioner's assignor.

Opinion Below.

The opinion of the United States Court of Claims, including Special Findings of Fact, has been transmitted to this Honorable Court by the United States Court of Claims as part of the entire record therein.

Jurisdiction.

The judgment of the United States Court of Claims was filed on July 9, 1951 and a petition for rehearing was denied on October 2, 1951. The jurisdiction of this Court is invoked under Title 28 U. S. C., Section 1255(1), as amended; 62 Stat. 928, June 25, 1948, ch. 646, §1.

Questions Presented.

(1) If limited authority in the form of a special signature authorization card filed with a branch of a bank has been given an agent to endorse and cash the checks of the principal, may the bank assert an estoppel against the payee where:

(a) The endorsement was by one not named on the authorization card, and

(b) the endorsement itself fraudulently purported to be that of the payee, and

(c) the employees of the cashing bank did not testify that they relied upon the authorization card when they cashed the check, and

(d) the endorsement showed on its face that it was improper and outside the authority set forth in the authorization card.

2. Does the fact that a former agent might have defrauded his principal by wrongfully endorsing checks payable to the principal by attempting to use an uncancelled authorization card inadvertently remaining with a depository bank entitle that bank to assert an estoppel against the principal where:

(a) the former agent caused his subagent to endorse the check, and

(b) the subagent endorsed the check in a manner not authorized by the authorization card, and

(c) the employees of the bank were not called to testify that they had relied upon the authorization card when they cashed the check, and

(d) the endorsement showed on its face that it was improper and outside the authority set forth in the authorization card.

3. Under California law, and particularly under California Civil Code Section 2349, may a limited special agent authorize a subagent to endorse checks payable and belonging to the principal?

Statutes Involved.

1. Section 2022 of the California Civil Code: "A mere agent of an agent is not responsible as such to the principal of the latter."

2. Section 2350 of the California Civil Code: "If an agent employs a subagent without authority, the former is a principal and the latter his agent, and the principal of the former has no connection with the latter."

3. Section 2349 of the California Civil Code:

> "An agent, unless specially forbidden by his principal to do so, can delegate his powers to another person in any of the following cases, and in no others:
>
> 1. When the act to be done is purely mechanical;
>
> 2. When it is such as the agent cannot himself, and the sub-agent can lawfully perform;
>
> 3. When it is the usage of the place to delegate such powers; or,
>
> 4. When such delegation is specially authorized by the principal."

Introduction.

The United States Navy sent a check by mail to The Haneel Company, a partnership. The check was payable to the order of "Haneel Company." The Security-First National Bank of Los Angeles honored the following endorsement thereon:

The Haneel Company
By James V. Keys, Co-owner
44 Pay to the Order of 44
Security-First National Bank
of Los Angeles
Tri-Vision Sales Company

James V. Keys was never a co-owner of The Haneel Company; he had no connection therewith and this was a forged endorsement. A branch of this bank was once authorized, by a special signature authorization card, to honor the endorsement, "The Haneel Company, Tri-Vision Sales *Agency* by Ed. A. Bischoff," but the subsequent stamped endorsement on the Navy check was erroneously "Tri-Vision Sales *Company*," and was not signed by Ed. A. Bischoff. Accordingly, the stamped endorsement was also at variance with the authorization card.

The Court of Claims has held that the Security Bank was entitled to accept the forged payee endorsement and the improper deposit endorsement and that the bank incurred no liability by placing its own clearing house endorsement thereon whereby it guaranteed all prior endorsements.

This holding places in jeopardy the nationwide practice of authorizing individuals to endorse or sign checks for another. The opinion of the Court of Claims affects more than ordinary endorsements: it may be used in cases involving signatures by makers and endorsements by payees. Businessmen must be assured that special powers, in writing, to endorse will be strictly followed by banks. Otherwise, these limited authorizations must be abandoned. Businessmen must also be assured that checks cannot be cashed by forged payee endorsements.

Statement of Facts.

Petitioner, Charles R. Warfel, since April 15, 1946, has been the common law assignee for the benefit of creditors of The Haneel Company, a partnership composed of MacNeel Pierce and Nathan O. Hulsey doing business as Plastic & Rubber Products Company at 2100 Hyde Park Boulevard and also at 2124 Hyde Park Boulevard in Los Angeles, California. [Special finding of fact No. 1.]

The Haneel Company shipped certain merchandise to the United States Navy in Oahu, Territory of Hawaii, on or about March 12, 1946, based upon certain orders previously given to The Haneel Company. The Navy received the merchandise, as well as certain invoices covering the shipment in the total sum of $14,005.30. The Haneel Company made written demand upon the Navy (Ship's Service Department) for payment of that amount. [Special finding of fact No. 2.]

On December 19, 1946 the Ship's Service Officer at the United States Naval Ammunition Depot in Oahu addressed a letter to The Haneel Company at 2100 Hyde Park Boulevard and enclosed a check in the sum of $14,005.30 drawn on the Bank of Hawaii, Waipahu Branch, made payable to the order of The Haneel Company, 2100 Hyde Park Boulevard. [Special finding of fact No. 3.] The check, with the endorsements thereon, has been transmitted to this Court as plaintiff's Exhibit No. 5.

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The check was endorsed in the following manner:

"The Haneel Company
By James V. Keys, Co-owner
44 Pay to the Order of 44
Security-First National Bank
of Los Angeles
Tri-Vision Sales Company"

The first endorsement, "The Haneel Company by James V. Keys, Co-Owner" was written in pen and ink and the next endorsement, "Pay to the Order," etc., was made by a rubber stamp. [Special finding No. 9, Pltf. Ex. 5.]

James V. Keys was not and never had been a co-owner of The Haneel Company, nor was he ever associated with that organization in any manner whatsoever. Instead, Mr. Keys was apparently associated with one Ed. A. Bischoff, of the Tri-Vision Sales Company [Special finding of fact No. 6] and both Mr. Keys and Mr. Bischoff were joined as parties to this action by the United States of America but those defendants defaulted and have never participated in the proceedings except as witnesses. Neither of them has ever asserted a legal right to the check, or its proceeds.

Mr. Bischoff entered the picture sometime in 1945 when The Haneel Company undertook to sell and distribute cameras and related items. Bischoff was engaged to act as a sales agent with offices on the premises of The Haneel Company; he used the fictitious firm name of "Tri-Vision Sales Agency" and he apparently used The Haneel Company stationery at certain times. [Special finding of fact No. 4.]

After several months, and on or about February 25, 1946, Bischoff opened a bank account in the name of "Tri-Vision Sales Agency" in a branch of the Security-First National Bank of Los Angeles, 49th and Western Branch. At that time The Haneel Company, by MacNeel Pierce, signed and delivered to the bank an authorization card reading as follows:

"SECURITY-FIRST NATIONAL BANK OF LOS ANGELES:

"Until otherwise ordered in writing, you are hereby authorized to accept the endorsement *The Haneel Company, Tri-Vision Sales Agency.* By *Ed. A. Bischoff* on any checks or other items payable to me or to my order, and to pay to said *Ed. A. Bischoff* the amount represented by any such items or to deposit such items to his personal account or to any account he may direct; and I hereby agree to hold you harmless against any damage or expense to which you may be put by reason of your acting under this authorization.

"The Haneel Company
by: MacNeel Pierce

Address *2100 Hyde Pk. Blvd.*
Date *Feb. 25, '46* *Los Angeles 44, Calif."*

This authorization card [Finding No. 5] is a controlling factor in this petition and it has been transmitted to this Court as defendant's Exhibit No. 6. Except for the parts italicized above, the card is a printed form. [Special finding of fact No. 5.]

As shown by the record, the foregoing transactions between Bischoff and the petitioner's assignor and with the

Security-First National Bank occurred before the sale of the cameras to the United States Navy and before the common law assignment to the petitioner herein. Within approximately a month after the petitioner assumed his duties as the representative of the creditors of The Haneel Company, he made certain arrangements with Bischoff which were memorialized in an agreement dated May 23, 1946 and which are a part of the record before this Honorable Court as plaintiff's Exhibit No. 6.

After the assignment, but before the agreement of May 23, 1946, Bischoff organized the "Tri-Vision Sales *Company*" (Italics ours) and also changed the name of his bank account to the new fictitious firm name. [Special finding of fact No. 5.] In the May 23, 1946 agreement, Bischoff's newly organized Tri-Vision Sales Company was required to issue purchase orders to petitioner (operating, in this phase of its business, as Plastic & Rubber Products Company) and petitioner would cause units to be shipped and would invoice Bischoff for each unit. As a security procedure, Bischoff, as Tri-Vision Sales Company, was required to assign all invoices to petitioner, as well as all funds and/or negotiable paper in payment of the assigned invoices; all C. O. D. shipments and payments were to be delivered intact to petitioner. Petitioner, in turn, would remit to Bischoff all credit balances, if any, as they occurred. [Pltf. Ex. 6.]

Shortly after this arrangement (as shown in the agreement of May 23, 1946) had been set up, Bischoff moved his business from the premises of petitioner to a new lo-

cation some distance away. [Special finding of fact No. 4.]

At the time of the agreement of May 23, 1946, and up until the present day, Bischoff was and is heavily indebted to petitioner. An agreement was executed on September 18, 1946 for the purpose of liquidating and satisfying this debt, [Pltf. Ex. 8] but it was never satisfied as is evidenced by a compromise and settlement agreement dated November 20, 1947. [Pltf. Ex. 4.]

At about this time, (that is, during the months of April and May, 1946 when the new formalized procedure was set up to continue the operations of petitioner and Bischoff) mail directed to The Haneel Company was ordered to be forwarded by the postmaster to Bischoff at his new location. The court below has found that this order was "apparently at the direction of Mr. Campbell," an employee of petitioner. [Special finding No. 7.] Your petitioner, however, unequivocally testified that he did not know of any such transfer of The Haneel Company mail and that when he first learned of it, he countermanded any such understanding in the mind of the postmaster. [Tr., p. 73, Q. 185; p. 87, Q. 252.]

This was the situation as it existed on or about January 4, 1947 when Mr. Keys, apparently a partner or associate of Bischoff, opened a letter addressed to The Haneel Company and containing the Navy check now in dispute. Keys testified that he opened the letter and after talking with Bischoff on the telephone, placed the endorsement on the check that has heretofore been set forth. At this

point, it would appear desirable to show the endorsement placed upon the check by Mr. Keys alongside the endorsement authorized by the card deposited with the 49th and Western Branch of the Security-First National Bank:

Actual Endorsement	Authorized Endorsement
"The Haneel Company By James V. Keys, Co-owner 44 Pay to the Order of 44 Security-First National Bank of Los Angeles Tri-Vision Sales Company"	"The Haneel Company, Tri-Vision Sales Agency. By Ed. A. Bischoff"

[Special finding of fact No. 9.]

Keys testified, and the court so found, that the check was deposited in the account of Tri-Vision Sales Company and was credited to that account. In due course, the Bank of Hawaii paid to the Security-First National Bank the amount of the check from the funds of the defendant United States. [Special finding of fact No. 9.]

The court below found that Keys had placed the endorsement on the check and deposited the same with the Tri-Vision Sales Company account, pursuant to instructions from Bischoff and that Keys never was a co-owner of The Haneel Company nor had he ever any ownership or other interest therein. [Special finding of fact No. 9.]

It is a fact, and the court below so found, that the proceeds of the check were never given either to petitioner or to his assignor, but the court also found that the petitioner had learned that Bischoff received the Navy check a few weeks after such receipt. [Special finding of fact No. 10.] Petitioner testified that he had not learned of the

conversion of the check by Bischoff until he had received advice from the United States Navy [Tr., p. 74, Q. 172] and it is clear, from the evidence, that petitioner consistently wrote to the Navy with regard to the whereabouts of the check and asked for a photostatic copy thereof when the Navy finally determined the facts. [Tr., p. 36, Q. 12.]

It is interesting to note that Bischoff testified that he had often endorsed checks made payable to The Haneel Company, even after the assignment to petitioner [Tr., p. 176, Q. 288], but the Court made no finding upon this testimony. Neither the United States nor the Third Party Defendant saw fit to introduce evidence from any representative of the Security-First National Bank to this effect. From the state of the record, and from the findings of the Court, one must conclude that the agreement of May 23, 1946 [Pltf. Ex. 6] was adhered to and that Bischoff never endorsed checks made payable to The Haneel Company after that date—if, indeed, he ever endorsed the Haneel Company checks.

So far as the record shows, Mr. Keys never endorsed any Haneel Company check except the one here in dispute, since his testimony is mute on this point, and he apparently considered himself obligated to call Bischoff before handling the instant check in the manner hereinabove related. In any event, it is undisputed that there was never any authorization given to Keys to endorse and deposit checks made payable to The Haneel Company, nor was Keys a co-owner of The Haneel Company.

Comment Upon the Facts and the Opinion Below.

Though it has been necessary to relate the facts at some length, petitioner places particular stress upon the difference between the endorsement authorized and the endorsement actually used. At the outset it is important to note that Bischoff had no actual authority to endorse checks made payable to The Haneel Company after the assignment, irrespective of the agreement of May 23, 1946, since his authority was terminated by operation of law owing to the insolvency of his principal. (Rest. Agency, Secs. 114, 124; see generally cases cited 2 C. J. S. 1173.) Assuming however, that the 49th and Western Branch of the Security-First National Bank of Los Angeles was entitled to rely upon its uncancelled authorization card, it is logical to expect that one would look at that card to determine the basis for such reliance. The card in the hands of the 49th and Western Branch could not, under any stretch of imagination, have been relied upon by individuals at the Alhambra Branch for the acceptance of Keys' endorsement upon the disputed check. In the first place, *Bischoff was the only one authorized to endorse the checks and he did not endorse; Keys' name was placed upon the endorsement. In the second place, Keys did not endorse the check as the Tri-Vision Sales Agency but as a co-owner of The Haneel Company, which he was not. In the third place, after fraudulently holding himself out to be the co-owner of The Haneel Company, he then placed a further endorsement on the check as the Tri-Vision Sales Company and not as the Tri-Vision Sales Agency.*

It is the contention of the petitioner that the endorsement was an outright forgery and was accepted by the bank under the mistaken belief, or the sheerly negligent

assumption, that Keys was a co-owner of The Haneel Company. Had the bank relied upon the authorization card, it could never have accepted the endorsement of Keys because of the overwhelming dissimilarity between the endorsement used and the endorsement allegedly authorized.

The opinion below, nevertheless, relies upon the endorsement card; the Court of Claims has assumed that the petitioner is in some way estopped to deny the authority set forth in the authorization card. As hereinabove stated, the authorization card could not have been relied upon by the bank. Even more, as will be shown in a later section of this Petition, under California law the contention of estoppel must be grounded in proof. A severe and stringent burden of proof rests with a party claiming estoppel. It is significant that neither the defendant nor the Third Party introduced any evidence to support the contentions of the estoppel, except for the placing in evidence of the authorization card. This failure of proof, this failure to produce a single employee or agent of the bank who would state such reliance is destructive of the contention of estoppel.

The Court of Claims assumed, however, that the petitioner has no basis for complaint because the check was deposited in the very account that was contemplated by the unrevoked authorization card. Petitioner is frank to state that it does not understand this reasoning. The mere possibility that Bischoff could have misappropriated the funds (as far as the bank was concerned) by endorsing the check in the manner set forth in the authorization card cannot excuse the improper endorsement used on this check. Petitioner puts forth the proposition that it is more logical to assume that Bischoff did not endorse

the check as shown on the authorization card because he did not dare to do so in the face of the revocation of his authority. Instead, Bischoff injected a stranger into the transaction and gave himself a cushion on which he could later fall; if any question should arise, he could contend that there had been a misunderstanding. Keys, on the other hand, could make the same claim. It is incredible to believe that Keys innocently assumed a fact that he knew was not true, to wit, that he was a co-owner of The Haneel Company. This was a deliberate untruth, calculated to deceive not only the petitioner but the bank as well. Had Bischoff intended to endorse the check in accordance with the authorization card that he well knew contained no force, he would hardly have instructed Keys to endorse the check as a co-owner of The Haneel Company. By the same token, if Keys had endorsed the check in the ordinary course of events as an associate of Bischoff and the Tri-Vision Sales Company, he would hardly set forth that he was a co-owner of The Haneel Company.

The check, therefore, did not go where it was authorized to go. It was no mere technical variance between the actual and the allegedly authorized endorsement that should be forgiven and forgotten because the proceeds went into the "proper" account. Instead, there was a fraudulent and criminal misappropriation of petitioner's funds which he was to hold for the benefit of all of the creditors and this fraud was based upon the false endorsement setting up Keys as a co-owner of The Haneel Company. There was never any belief on the part of the employees of the bank that this was an endorsement authorized by any authorization card.

REASONS FOR GRANTING THE WRIT.

I.

The Court of Claims Erred in Holding That Bischoff Had Ostensible Authority to Endorse the Check. This Ruling Is Contrary to Prevailing Law.

The opinion of the court below concedes that Bischoff had no actual authority to endorse the check involved in this case. It holds, however, that the existence of the authorization card gave Bischoff (and, therefore, Keys) ostensible authority, so far as the Security-First National Bank was concerned, to make an endorsement thereon.

This ruling by the Court of Claims renders insecure the position of any principal who delegates the authority to his agent to endorse commercial paper by means of authorization cards entrusted to banking institutions, as was done in the present case.

It is a matter of common knowledge that business firms and individuals carefully set forth on authorization cards the endorsements that are permissible on commercial paper made payable to designated payees. It is of utmost importance that businessmen be assured that the banking institution will be responsible where significant deviations occur from such prescribed authorized endorsements. In the present case, for example, it has been pointed out in the immediately preceding section of this petition that it is inconceivable that the bank could have passed the endorsement on the Navy check upon the basis of the authorization card deposited with it. The bank could rely

upon the authorization card only if the endorsement used actually conformed with it. The general rule is as stated in 7 Am. Jur., Banks, Section 526 at page 380:

> "It is also to be observed that the authority of the bank to make payments in this respect may depend upon the form of signature by the agent. It is well settled generally that the signature upon which a debtor is to be bound and the bank is to be authorized to disburse money may be whatever they agreed on. Therefore, when the debtor authorizes the bank to pay checks signed by his agent in a particular manner, the bank is authorized only in paying checks signed by each in such manner."

The petitioner cited several cases to the court below covering this principle:

Standard Steam Specialty Co. v. Corn Exchange Bank (1917), 220 N. Y. 478, 116 N. E. 386;

Schwarz v. Bank of Pgh. Nat. Ass'n (1925), 283 Pa. 200;

California Stucco Co. v. Marine Nat. Bank (1928), 148 Wash. 341, 268 Pac. 891.

All of the foregoing cases state that where authority is given to accept a certain endorsement, a bank has no right to accept a different endorsement. The court below distinguished these cases upon the ground that they were concerned with situations where an agent was authorized to endorse specially (usually for deposit to the credit of the principal), and where the agent endorsed in blank and converted the proceeds. It is true that these cases dealt with situations where the agent converted the proceeds rather than depositing them in the account of the principal, but were this the only point of these cases,

there would have been no need to discuss the variations from the authorized form of endorsement. The mere fact that the agent had converted the proceeds rather than depositing them would have been sufficient. Nevertheless, the courts in each of these cases condemned the action of the bank involved for the reason that the endorsements varied from the one allowed.

At the risk of unnecessarily repeating the point, petitioner wishes to make it clear that there was no evidence introduced in the instant case to support a claim that the bank relied upon the authorization card in its possession, since the authorization card bears no similarity to the endorsement actually used.

II.

The Court Below Erred in Assuming That Keys Had Authority to Endorse and Cash the Check and Its Holding Is Directly Contrary to California Law.

The Court of Claims has assumed, erroneously in the first instance, that Bischoff had ostensible authority to endorse the check. It has been demonstrated that Bischoff might have had ostensible authority (as far as the bank was concerned) to endorse the check in a certain manner, but certainly not in the manner actually used. From this misconception, the Court of Claims has proceeded to a further and more grievous error: The Court assumes that if Bischoff had ostensible authority, the bank was authorized, or justified, in accepting the endorsement of Keys.

The petitioner cited authority to the court below, to demonstrate that such a position would be directly con-

trary to California law, yet, the court's opinion fails to discuss this point. Keys, as an agent of Bischoff, was in no way responsible to Bischoff's principal:

> "A mere agent of an agent is not responsible as such to the principal of the latter." (Cal. Civ. Code, Sec. 2022.)

By a parity of reasoning and statutory authority, the principal was in no way responsible for or bound by the subagent since the principal had no knowledge of the subagent and had not authorized his employment.

> "If an agent employs a sub-agent without authority, the former is a principal and the latter his agent, and the principal of the former has no connection with the latter." (Cal. Civ. Code, Sec. 2350.)

Finally, there is a particular portion of the California Civil Code, Section 2349 which circumscribes the power of an agent to delegate his own powers:

> "Powers Delegable.—An agent, unless specifically forbidden by his principal to do so, can delegate his powers to another person in any of the following cases, and in no others:
>
> 1. When the act to be done is purely mechanical;
>
> 2. When it is such as the agent cannot himself, and the sub-agent can lawfully perform;
>
> 3. When it is the usage of the place to delegate such powers; or
>
> 4. When such delegation is specially authorized by the principal."

It is clear that the authority to endorse paper and deposit the same in the agent's own account to do with as he pleases cannot be delegated to a subagent under any

of the specifically enumerated portions of the foregoing Code sections. The only contention that could be made in this regard is that the act was "purely mechanical." There is nothing mechanical about endorsing negotiable paper made payable to another where the proceeds from that paper do not flow to the payee directly. This is a highly delicate form of dealing with the property of another and one does not entrust that power to a person with the idea that the discretion will be exercised by someone else. The California Supreme Court has held, for example, that where the cashier of a bank has been given authority by the bank to take all necessary steps he may deem best in the matter of the bank's claim against another bank, there is, nevertheless, no power on the part of the cashier to delegate authority to an attorney to assign that claim or even to substitute the attorney as general agent of the bank instead of the cashier—even though the assignment was purely for the purposes of collection only.

Dingley v. McDonald (1899), 124 Cal. 682.

This case was one dealing solely with the delegable powers of an agent. The court states that the case was one ". . . based upon a special trust and confidence reposed in his personal ability and integrity, and the rule is that such power, in the absence of authority, express or implied, cannot be redelegated by the agent so as to bind the principal."

Even, therefore, if the principal were misled in reposing trust and confidence in Bischoff at one time, he was not reposing that trust and confidence in any other. Banks must be mindful that authority to endorse negotiable paper rests only in the person to whom the authority is specifi-

cally granted and not in any other. Bischoff's authority to endorse paper had long since terminated when this check was misappropriated and he did not even possess the limited powers of redelegation that might rest with an actual agent. The Court of Claims here has stacked ostensible authority upon ostensible authority for the purpose of reaching a result outside the contemplation of any of the parties.

III.

The Court of Claims Erred in Holding That the Burden Rested With Petitioner To Disprove Keys' Ostensible Authority. This Is in Direct Conflict With California Law.

It is implicit in the opinion of the court below that the burden rested with petitioner to show that an estoppel did not exist. The court has reversed the burden of proof and the substantive requirements of pleading and proving estoppel under California law. Indeed, no voluminous citations of authority are required on this point because the California law is clear beyond question. As the California Appellate Court has stated in the case of *Hammond Lumber Co. v. Weeks* (1930), 105 Cal. App. 315:

> "Estoppel is not favored, and it is incumbent upon one who advanced it to prove its dominant essentials, leaving nothing to silence or questionable inference."

(See also numerous cases cited in 10 Cal. Jur., p. 656, and Ten-Year Supp. thereto, Vol. 5, p. 600.)

No evidence was introduced by the United States or the Third Party Defendant to show that the bank relied upon the authorization card. No agent or employee of the bank was called to testify in this regard. No photostatic records of the bank were placed in evidence to show whether previous checks made payable to The Haneel Company had been endorsed in the manner used respecting the endorsement of the Navy check. The defense rested upon the very slim proposition that the mere placing of the authorization card with the 49th and Western Branch of the Security-First National Bank constituted an insuperable barrier to any claim of negligence and wrongdoing upon the part of the Alhambra Branch of the same bank. There is nothing in the record, for example, to show whether this special authorization card deposited with the 49th and Western Branch of the bank had even been seen by the officers or agents of the Alhambra Branch. For all that appears in the record, this authorization card might have rested at 49th Street and Western Avenue at Los Angeles from the beginning to the end of this matter until resurrected by the attorneys for the Third Party Defendant at the time of trial herein. No member of the bank was even called to testify that this authorization card had been transmitted to Alhambra.

It is difficult for petitioner to understand how the Court of Claims could have ignored this principle of California law, which is a principle of law generally, to wit, that estoppel must be proved by the party asserting it. Whether called estoppel or ostensible authority, the party setting

up the defense must show that in some way he relied upon something or believed that there was ostensible authority. Except for the authorization card (which was never proved to have been in the hands of the Alhambra Branch or in the active files of the 49th and Western Branch of the Security-First National Bank) the record is absolutely mute respecting reliance or knowledge upon the part of the Security-First National Bank.

Petitioner wishes to stress that he makes this allegation of total absence of evidence with no reservations of any kind whatsoever. This is not an instance of partisanship where testimony is ignored or misinterpreted by a litigant for the purpose of asserting that there is no evidence to support the judgment of the court below. Only Bischoff and Keys were called for the defense in this case and neither of them could testify that the signature card had been relied upon by the bank. They could not know what was in the mind of the employee of the bank who accepted the endorsement. Bischoff testified that he himself had endorsed other commercial paper payable to The Haneel Company but his testimony upon this point was apparently not convincing or believed because the Court of Claims refused to make a finding thereon. In any event, such testimony could not supply the requirement of proof upon the part of the person that claimed the reliance and Bischoff never testified he ever endorsed as an owner of The Haneel Company.

IV.

The Court Below Erred in Holding That the Proceeds of the Check Went Into the Intended Account.

This point has been discussed at some length under the COMMENT UPON THE FACTS section of this petition. The statement by the Court of Claims that, "there was no injury to plaintiff occasioned by the fact that Bischoff deposited through an agent" is, in a manner of speaking, difficult to attack directly.

The point is so ingenious that, with no intended discourtesy, it might have been germinated in Alice in Wonderland. Bischoff had no authority to endorse the check. Keys had no authority to endorse the check. Had Bischoff endorsed the check in his own name, in the manner set forth on the authorization card, he might have testified in the present case upon leave from a penal institution. Had he endorsed it as the co-owner of The Haneel Company, such would have undoubtedly been the case.

Keys was not a co-owner of The Haneel Company and had no authority from The Haneel Company to endorse checks. He could excuse his endorsement only on the ground that he received some instructions from Bischoff. Bischoff merely stated that he told Keys to put the check in his account. Neither of them has attempted to explain the reason for Keys' endorsement as a co-owner of The Haneel Company.

The assignee did not know of the authorization outstanding at the 49th and Western Avenue Branch of the

Security-First National Bank. He drew up a security procedure with Bischoff to protect against the use by Bischoff of Haneel Company accounts. The assignee had no dealings as a depositor, or otherwise, with the Security-First National Bank and would have had no occasion to notify it of the change in Bischoff's status. The assignee did not know that the mail had been diverted to Bischoff and, therefore, had no reason to advise the United States that the check should be sent otherwise than in the manner in which it was actually sent. The assignee had no reason to tell the postmaster that Haneel Company mail should not go to Mr. Bischoff because the assignee did not know that such mail was given to Bischoff.

There can be no question but that the creditors represented by the petitioner herein lost $14,005.30 by the fraudulent endorsement so negligently passed by the Security-First National Bank. To state that the bank would be guiltless if Bischoff himself had endorsed the paper in the specific manner authorized (and if the bank were to prove that it relied upon that authorization) is hardly to meet the issue. Some party who did not profit from the transaction must bear the loss since Bischoff and Keys (who did profit) have shown by their default in this case that they are unconcerned.

DARK PAGE BLEEDTHRU

V.

The Issuance of a Writ of Certiorari to Review the Opinion of the Court of Claims Is of Utmost Importance, to Prevent the Opinion of the Court of Claims From Being Used in the Future and by Other Courts in Exonerating Banks From Liability Where They Have Honored Forged Payee Endorsements and Improper Subsequent Endorsements.

The recognition of the endorsement by Keys in the present case is so patently negligent under all of the facts, that it is safe to say that no cancellation of the authority given the 49th and Western Avenue Branch would have changed the event that actually occurred. The Alhambra Branch of the bank honored Keys' signature, not because of that signature card but because he fraudulently endorsed the check as the co-owner of The Haneel Company. The authorization card that had been deposited with the 49th and Western Avenue Branch has been, until now, successfully interposed between the petitioner and recovery as the only defense that could be set up and neither the United States nor the Third Party thought enough of this defense to call witnesses to support it. The signature card was a gamble that has paid handsome rewards for the defense. It has paid these rewards because the Court of Claims has ignored California law and the ordinary facts of commercial life. If this sort of card can be interposed as a defense to a fraudulent endorsement that bears no resemblance to the authorization, then all reasons for these cards have been destroyed. Banks are thereby authorized to accept any endorsement of any kind whatsoever so long as some person who was once authorized to endorse in a certain manner has granted some-

body else the authority to endorse in an entirely different manner—in fact, as an alleged co-owner of the payee itself.

The judgment in the instant case, therefore, is not only in direct violation of the California and the general law, but it is destructive of a very common and important device used by businessmen in their relations with banks. It is important that the Court of Claims and all federal courts recognize the California principles of agency and estoppel in deciding cases arising out of contracts made in California, and that businessmen dealing with the United States Government shall be assured that disputes will be decided in accordance with governing law and in accordance with good business practice generally.

Conclusion.

The Court of Claims has exonerated all of the parties before it and has placed the loss upon the creditors of the innocent payee. Keys and Bischoff, who would ultimately bear the loss, took no action in their own defense and demonstrated that they had no response to the charges leveled against them. They defaulted when the United States joined them as third parties. It is, of course, understood that neither the United States nor the Third Party Bank of Hawaii, was negligent in any way. Gross negligence was committed by the Security-First National Bank of Los Angeles and this bank was not a party to the present litigation. The Third Party Bank of Hawaii merely relied upon the clearing house endorsement of the Security Bank.

The effect of all of the exonerations by the Court of Claims in this litigation is the further exoneration of the negligent party, the Security Bank. That bank supplied

no evidence toward the defense in this case except the authorization card which it hoped would be accepted as the basis for the honoring of the endorsements placed on the check by Keys. The Security Bank sent none of its agents or employees to testify for the reason that they could not, in good conscience, state on the witness stand that they used this authorization card when they honored Keys' endorsement. It is submitted that any such employee of the bank would have been compelled to admit that he accepted the Keys endorsement because he assumed that Keys was the co-owner of The Haneel Company.

Citations of authority are unnecessary to establish the proposition that a payee shall not be charged with a forged endorsement where the payee did not receive the proceeds of the check and the forger *has* received such proceeds. Yet, the Court of Claims by its ruling in this case, has arrived at a contrary result.

Wherefore your petitioner prays that this Court issue a writ of certiorari reviewing the judgment of the United States Court of Claims, entered on July 9, 1950, as described in the within petition, and that the judgment of the said United States Court of Claims be reversed.

Respectfully submitted,

GENDEL & RASKOFF and
BERNARD SHAPIRO,
By MARTIN GENDEL,
Attorneys for Petitioner.

DARK PAGE BLEEDTHRU

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 510

CHARLES REDCAY WARFEL, as assignee for the Benefit of Creditors of The Haneel Company, a partnership, *Petitioner*

v.

THE UNITED STATES AND BANK OF HAWAII

On Petition for a Writ of Certiorari to the United States Court of Claims

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 17-23) is reported at 98 F. Supp. 340.

JURISDICTION

The judgment of the Court of Claims was entered on July 9, 1951 (R. 23). Petitioner's motion for a rehearing was denied on October 2, 1951 (R.

23). The petition for a writ of certiorari was filed on December 31, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

Whether the Court of Claims correctly held that an endorsement on a check in behalf of the payee passed title to the instrument.

STATUTES INVOLVED

No statutes are directly involved in this case.[1]

STATEMENT

This case arises out of petitioner's claim for the amount of a check drawn by a Navy Ship's Service Department[2] in Hawaii. The following is a sum-

---

[1] Petitioner refers to several provisions of the California Civil Code as being involved in this case (Pet. 4). However, if the obligation sued upon is a federal obligation, as contended by petitioner, federal and not state law would be controlling. *Clearfield Trust Company* v. *United States*, 318 U. S. 363; *National Metropolitan Bank* v. *United States*, 323 U. S. 454. If, on the other hand, as we point out below, pp. 10-11, the obligation is not a federal one, there is no basis for the suit in the Court of Claims and the state law would for that reason be of no significance.

[2] The Ship's Service Departments operate the Naval Ship's Service Stores which supply naval personnel with articles and personal services necessary for their comfort and convenience. U. S. Navy Regulations, Art. 1972. Post exchanges perform the same function for Army and Air Force personnel and their families. Army regulations 60-10; Air Force Regulations 147-7.

mary of the facts found by the Court of Claims (R. 12-17):

In 1945, the Haneel Company, a partnership composed of MacNeel Pierce and Nathan O. Hulsey, undertook the manufacture and sale of cameras, viewers and slides (R. 12, 13). The partnership arranged with Edward A. Bischoff to take charge of the sales and distribution of the cameras and related items (R. 13). Bischoff operated from the Haneel Company's office, using the company's name as well as the name "Tri-Vision Sales Agency" for his sales and distribution work (R. 13).

On February 25, 1946, Bischoff opened a bank account in the name of the Tri-Vision Sales Agency in a branch of the Security-First National Bank of Los Angeles (R. 14). On the same day the Haneel Company delivered to the bank an authorization card signed by MacNeel Pierce on behalf of the Haneel Company (R. 14). This card, which authorized the bank to accept for deposit in Bischoff's personal account checks made payable to the Haneel Company and to pay to Bischoff the amount represented by such checks, stated (R. 14):

> Security-First National Bank of Los Angeles:
>
> Until otherwise ordered in writing, you are hereby authorized to accept the endorsement *The Haneel Company, Tri-Vision Sales Agency.* By *Ed. A. Bischoff* on any checks or

other items payable to me or to my order, and to pay to said *Ed. A. Bischoff* the amount represented by any such items or to deposit such items to his personal account or to any account he may direct; and I hereby agree to hold you harmless against any damage or expense to which you may be put by reason of your acting under this authorization.

THE HANEEL COMPANY
by: MACNEEL PIERCE
Address 2100 Hyde Pk. Blvd.
Los Angeles 44, Calif.

Date Feb. 25, '46

To endorse for any purpose.

This authorization was not revoked by the Haneel Company until September 11, 1947 (R. 15).

About two months after Bischoff opened the bank account, the Haneel partners, having encountered financial difficulties, made a common law assignment for the benefit of creditors to Charles R. Warfel, the petitioner here (R. 12, 18). This assignment did not affect Bischoff's sale and distribution of Haneel cameras (R. 14, 18). The assignment was not recorded; nor did petitioner give notice of the assignment to anyone but tax authorities and creditors of the Haneel Company (R. 15).

Shortly after the assignment, in April, 1946, Bischoff discarded the name "Tri-Vision Sales Agency," took the name "Tri-Vision Sales Com-

pany", and changed the name of his bank account in the Security-First National Bank to "Tri-Vision Sales Company" (R. 13, 15). The name was changed at the suggestion of Mr. Hulsey, one of the Haneel partners, and Mr. Campbell, the Haneel comptroller, in order to obtain certain advantages under the tax laws and O.P.A. regulations (R. 13). Bischoff, as the Tri-Vision Sales Company, continued without substantial change the sales and distribution of Haneel cameras, which he had previously carried on in the name of the Haneel Company, Tri-Vision Sales Agency. (R. 14). Neither Tri-Vision Sales Agency nor Tri-Vision Sales Company was incorporated; both were fictitious names under which Bischoff did business (R. 14).

For about three months after the name "Tri-Vision Sales Company" was selected, Bischoff and the Haneel Company (which was then controlled by petitioner as assignee for the benefit of creditors) continued to conduct their business from the same address and without substantial change in routine (R. 14, 18). Bischoff then moved the office of Tri-Vision Sales Company to a different address from that occupied by the Haneel Company (R. 15). At about this time (i.e. June, 1946), mail addressed to the Haneel Company began being forwarded by the Postmaster to Bischoff at his new Tri-Vision Sales Company address (R. 15). The forwarding of the mail was done at the direction of Haneel's comptroller, Mr. Campbell (R. 15).

In March, 1946, a shipment of cameras, viewers and slides had been sold by the Haneel Company to a Navy Ship's Service Department in Hawaii (R. 13). The shipment was paid for in December, 1946, by a check drawn to the order of the Haneel Company by the Ship's Service Department on its account in the Bank of Hawaii (R. 13). Although the check was mailed in an envelope bearing the Haneel Company address, it was delivered in accordance with Haneel's comptroller's directions to Tri-Vision Sales Company's new office (R. 15). The envelope was received and opened on January 4, 1947 by James V. Keys, a part-owner of the Tri-Vision Sales Company (R. 15). Keys, after talking with Bischoff on the telephone and being instructed to deposit the check in the Tri-Vision Sales Company account at the Security-First National Bank, placed the following endorsement on the check (R. 15):

> The Haneel Company
> By James V. Keys, Co-Owner
> 44 Pay to the Order of 44
> Security-First National Bank of Los Angeles
> Tri-Vision Sales Company.

Keys then deposited the check and it was paid by the Security-First National Bank and credited to the account of the Tri-Vision Sales Company (R. 16). In due course the Bank of Hawaii, the

drawee, paid the amount of the check to the Security-First National Bank from funds of the Navy Ship's Service Department on deposit (R. 16).

A few weeks later, petitioner learned of the receipt and deposit of the check in the Tri-Vision Sales Company account, but never demanded the proceeds of the check from Bischoff (R. 16). In November, 1947, a settlement of differences between Bischoff and the Haneel Company stipulated that the "settlement does not in any way involve" the check and that petitioner reserved any rights he might have "against the United States Navy or any bank involved in the transaction whereby [Bischoff] cashed" the Navy Ship's Service Department check (R. 16-17).

In 1949, petitioner instituted this suit against the United States, claiming that Keys' endorsement was a forgery and that petitioner's assignor, the Haneel Company, had therefore never been paid (R. 1-4). The United States filed a general traverse denying every allegation of the petition (R. 5). The United States also brought in the Bank of Hawaii as third party defendant, contending that if the United States should be judged liable, judgment should, in the same action, be rendered against the Bank of Hawaii for having paid on a forged endorsement (R. 5, 20).

The Court of Claims held the United States not liable, ruling that Bischoff was authorized to deposit Haneel Company checks in his Tri-Vision

Sales Company account; that Keys, who had actually endorsed the check in question, was Bischoff's agent; and that therefore there was no forgery (R. 21, 23). The Court accordingly dismissed Warfel's petition against the United States and did not pass on the contingent claim of the United States against the Bank of Hawaii (R. 23).

ARGUMENT

The petition suggests no conflict of decisions and presents no novel issue of law calling for authoritative determination by this Court. That an endorsement which is forged or made without the authority of the person whose signature it purports to be is inoperative is not open to question. See Negotiable Instruments Law, Section 23. The court below recognized and applied this principle in deciding the only question involved in this case—i.e., whether Keys' endorsement was sufficient to pass title, as respondents contended. The facts involved fully support the court's determination that the endorsement passed title. In addition, there is a serious question as to whether the Court of Claims had jurisdiction of this action because the obligation to pay for the cameras purchased by the Ship's Service Department was not that of the United States but was solely that of the Ship's Service Department. We accordingly submit that review here by writ of certiorari is unwarranted.

1. There is no doubt that the authorization card filed by the Haneel Company with the Security-

First National Bank fully authorized Bischoff to endorse checks made payable to the Haneel Company and to deposit the proceeds in "his personal account" or in "any [other] account" selected by him (R. 14). Petitioner's chief contention is that here Keys, rather than Bischoff, made the endorsement. This fact would be material only if Keys acted without authority from Bischoff and converted the proceeds of the check to his personal account. But the record here makes it clear that Keys endorsed the check in accord with Bischoff's instructions and that the proceeds did not go into Keys' personal account but were credited to Bischoff's Tri-Vision Sales Company account. This was permitted and intended by the authorization card filed by the Haneel Company. And it is obvious that where the proceeds of the check reach the person intended, there is no liability to the payee whether the endorsement was authorized or forged. *Beeson-Moore Stave Co.* v. *Clark County Bk.*, 160 Ark. 385, 254 S. E. 667; *Couture* v. *Ocean Park Bank*, 205 Cal. 338, 270 Pac. 943; *Federal Land Bank* v. *Omaha Nat. Bank*, 118 Nebraska 489, 225 N. W. 471, and cases there cited. The court below was therefore correct in ruling in this case that "although the endorsement accepted by the bank money went into exactly the same account that it differed from that on the authorization card, the would have had the endorsement followed strictly the authorization. There was no injury to plaintiff

occasioned by the fact that Bischoff deposited through an agent" (R. 23).

2. There is an additional reason requiring dismissal of this claim against the United States. Petitioner's case rests on the theory that the obligation to pay for the cameras and viewers supplied to the Navy Ship's Service Department was an obligation of the United States (R. 1-4). But, as this Court has observed with respect to post exchanges, the Army and Air Force counterparts of Navy Ship's Service Stores and Departments: "The Government assumes none of the financial obligations of the exchange." *Standard Oil Co.* v. *Johnson,* 316 U.S. 481, 485; see also Army regulations 60-10, Air Force Regulation 147-7.[3] If an obligation incurred by a post exchange is not a governmental obligation, it follows that one incurred by a Ship's Service Store or Department—which performs the same function for naval personnel as do the Post Exchanges for Army and Air Force personnel—imposes no financial obligation upon the United States. This is made clear by the purchase orders issued by Navy Ship's Service Stores and Departments. The Navy Department advises us that at least since 1946 these purchase orders have regularly provided that the obligations they create "shall not be a liability of the United

[3] Paragraph 25 of the cited Army and Air Force Regulations provides that vendors selling merchandise to the post exchanges are to "be notified that the contract is not an obligation of the United States Government."

States Government." That the obligation here involved is as that of the Ship's Service Department and not that of the United States is underscored by the fact that the check was not drawn on the Treasurer of the United States by a disbursing officer acting in his official capacity but was drawn on the Ship's Service Department's personal account in a private bank in Hawaii by the Ship's Service officer (R. 4B). Since the obligation here sued on was not a governmental obligation, we submit that no basis existed for the instant suit in the Court of Claims.

CONCLUSION

The decision of the Court of Claims dismissing the claim is clearly correct. There is no conflict of decisions and further review is not warranted. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH, 1952

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 510.

CHARLES REDCAY WARFEL, as assignee for the benefit of the HANEEL CO., a partnership, *Plaintiff*,

v.

THE UNITED STATES OF AMERICA, *Defendant*,

and

BANK OF HAWAII, *Third Party Defendant.*

BRIEF OF THIRD PARTY DEFENDANT BANK OF HAWAII IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

THE FACTS.

The facts in this case as found by the Court of Claims are as follows:

Special Findings of Fact.

1. Plaintiff, Charles R. Warfel, at all times since April 15, 1946, has been the assignee for the benefit of creditors

of The Haneel Company, a partnership composed of MacNeel Pierce and Nathan O. Hulsey doing business as Plastic and Rubber Products Company at 2100 Hyde Park Boulevard and also at 2154 Hyde Park Boulevard, Los Angeles, California.

2. On or about March 12, 1946, The Haneel Company shipped to the Ship's Service Department, U. S. Naval Ammunition Depot, Oahu, Territory of Hawaii, certain cameras, viewers, and slides. This shipment was based upon an order or orders previously given to The Haneel Company. The merchandise was received, and invoices dated March 8 and March 13, 1946, covering this shipment in the total sum of Fourteen Thousand Five Dollars and Thirty Cents ($14,005.30), were forwarded by The Haneel Company to the Ship's Service Department. Thereafter, The Haneel Company made written demand to the Ship's Service Department for payment of the amount referred to above.

3. On December 19, 1946, the Ship's Service officer at the U. S. Naval Ammunition Depot addressed a letter to The Haneel Company, 2100 Hyde Park Boulevard, and enclosed a check in the sum of $14,005.30 on the Waipahu Branch, Bank of Hawaii, made payable to the order of Haneel Company, 2100 Hyde Park Boulevard.

4. Edward A. Bischoff, by an arrangement with MacNeel Pierce and Nathan O. Hulsey, undertook to sell and distribute cameras and related items from the time The Haneel Company began their manufacture sometime in 1945. In order to assist in financing such sale and distribution of cameras, Bischoff gave the comptroller of The Haneel Company $4,000 which was deposited in its account by such company at the California Bank in Los Angeles, California. Bischoff used the name "Tri-Vision Sales Agency" as well as the name "The Haneel Company" in his original operations with the firm. He occupied an office first at 2100 Hyde Park Boulevard and later at 2154 Hyde

Park Boulevard in the offices of The Haneel Company, and was in charge of all sales activities for The Haneel Company for a period of six or seven months.

On April 30, 1946, because of certain complications which arose due to the imposition of excise tax on cameras and the operations under OPA, at the suggestion of Mr. Nathan O. Hulsey and Mr. Cliff Campbell, comptroller of The Haneel Company, Bischoff organized a firm known as "Tri-Vision Sales Company" at 2154 Hyde Park Boulevard, Los Angeles, California. The firm continued without substantial change the sales and distribution of Haneel cameras and related items which had previously been carried on in the name of The Haneel Company, Tri-Vision Sales Agency. Neither Tri-Vision Sales Agency nor Tri-Vision Sales Company was incorporated. Both were fictitious-name firms of which Ed. A. Bischoff was sole proprietor. After operating at the address shown above for three or four months, the Tri-Vision Sales Company moved to a new location.

Subsequent to the assignment for the benefit of creditors, an arrangement was worked out between Bischoff and the assignee under which Bischoff continued to sell Haneel cameras and to make adjustments required because of these and previous sales.

5. Mr. Bischoff opened a bank account in the name of Tri-Vision Sales Agency on February 25, 1946, in a branch of the Security-First National Bank of Los Angeles. On the same day this account was opened, The Haneel Company, by MacNeel Pierce, signed and delivered to the Security-First National Bank of Los Angeles an authorization card dated February 25, 1946, reading as follows:

To endorse for any purpose

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES:

Until otherwise ordered in writing, you are hereby authorized to accept the endorsement *THE HANEEL COMPANY, TRI-VISION SALES AGENCY.* By *Ed. A. Bischoff* on any checks or

other items payable to me or to my order, and to pay to said *Ed. A. Bischoff* the amount represented by any such items or to deposit such items to his personal account or to any account he may direct; and I hereby agree to hold you harmless against any damage or expense to which you may be put by reason of your acting under this authorization.

The Haneel Company
by: MacNeel Pierce
Address *2100 Hyde Pk. Blvd.*
Los Angeles 44, Calif.

Date *Feb. 25, '46*

The italicized parts were filled in by hand in ink, and the rest of the card was a printed form.

This authority was not revoked by the Haneel Company until September 11, 1947.

On May 2, 1946, Ed. A. Bischoff caused the bank account he had opened in the name of "Tri-Vision Sales Agency" to be changed to the name of "Tri-Vision Sales Company."

6. James V. Keys became a part owner of the Tri-Vision Sales Company sometime in the summer of 1946. He was never employed directly by, nor did he have any proprietary interest in, The Haneel Company.

7. At about June 1946, when the Tri-Vision Sales Company moved from 2154 Hyde Park Boulevard, Mr. Bischoff had a discussion with Mr. Campbell, the comptroller of The Haneel Company, relating to the forwarding of The Haneel Company mail to Mr. Bischoff. At about this time Bischoff was engaged in making certain adjustments with respect to defective cameras and related merchandise which had been sold by The Haneel Company previously. After this discussion, mail addressed to The Haneel Company was forwarded by the postmaster, apparently at the direction of Mr. Campbell.

8. There is no evidence that Warfel, as assignee of The Haneel Company, recorded his assignment, or that he noti-

fied the defendant, The United States (excepting its tax agencies), or the Security-First National Bank of Los Angeles of his appointment as assignee. There is no satisfactory evidence that he notified anyone excepting creditors of The Haneel Company of such appointment.

9. The letter and check referred to in Finding 3 were received by the Tri-Vision Sales Company at its office at 1507 and 1509 Fremont Avenue, Alhambra, California. On or about January 4, 1947, James V. Keys opened the letter, and after talking with Mr. Edward A. Bischoff on the telephone, placed the following endorsement on the check:

The Haneel Company
By James V. Keys, Co-Owner

44 Pay to the Order of 44
Security-First National Bank
of Los Angeles
Tri-Vision Sales Company

The first endorsement, to wit: "The Haneel Company by James V. Keys, Co-Owner," was written in pen and ink, and the next endorsement, to wit: "Pay to the order of Security-First National Bank of Los Angeles, Tri-Vision Sales Company," was made by a rubber stamp.

He then deposited the check in the account of the Tri-Vision Sales Company. The check was paid by the Security-First National Bank and credited to the account of the Tri-Vision Sales Company. In due course the Bank of Hawaii paid to the Security-First National Bank the amount of said check from funds of defendant, The United States, on deposit.

Keys placed said endorsement on said check and deposited it to the credit of Tri-Vision Sales Co. in the Security-First National Bank, pursuant to instructions from Bischoff. Keys has never been a co-owner of Haneel Company; nor has he ever had any ownership or other interest therein.

10. A few weeks later Mr. Warfel, the assignee, learned that Bischoff had received the Navy check. Mr. Warfel has never demanded the proceeds of the check from Mr. Bischoff. The proceeds of such check were never given to either Mr. Warfel or Mr. MacNeel Pierce.

11. On November 20, 1947, Mr. Bischoff on the one hand, and Messrs. Warfel, as assignee, and MacNeel Pierce and Nathan O. Hulsey on the other, entered into a compromise and settlement of an action at law in the Superior Court of Los Angeles County brought by Warfel, as assignee, against Bischoff and in which a cross-complaint was filed by Bischoff. In such compromise and settlement which is in evidence as plaintiff's exhibit 2, Bischoff agreed to pay $10,000 in installments, in default of which he was to become liable for the payment of $34,503.58. There is quoted below a reservation made in such compromise and settlement:

> *THREE:* This compromise and settlement expressly reserves to you and your assignor all rights which you may have against the U. S. Navy or any bank involved in the transaction whereby the undersigned cashed a check in the sum of $14,005.30, drawn on the Waipahu Branch of the Bank of Hawaii, and made payable to Haneel Company; it is expressly agreed that this compromise and settlement does not in any way involve the above described check, or any acts or conduct on the part of the undersigned in connection therewith.

THE ARGUMENT.

1.

Jurisdiction.

At the beginning of the argument we should like to point out to the Court that this is not a case in which a writ of certiorari should be granted.

Section 1255 of the Judicial Code provides:

> "Cases in the Court of Claims may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted on petition of the United States or the claimant;

(2) By certification of any questions of law by the Court of Claims in any case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions on such question. June 25, 1948, c. 646, 62 Stat. 928."

This is the only way in which a judgment of the Court of Claims can be reviewed.

This section was based on the Act of February 13, 1925 as amended, but the changes that were made in this act are significant. The old act provided:

"Section 3. (b) In any case in the Court of Claims, including those begun under section 180 of the Judicial Code, it shall be competent for the Supreme Court, upon the petition of either party, whether Government or claimant, to require, by certiorari, that the cause be certified to it for review and determination of all errors assigned, with the same power and authority, and with like effect, as if the cause had been brought there by appeal. In such event, the Court of Claims shall include in the papers certified by it the findings of fact, the conclusions of law, and the judgment or decree, as well as such other parts of the record as are material to the errors assigned, to be settled by the Court.

The Court of Claims shall promulgate rules to govern the preparation of such record in accordance with the provisions of this section.

In such cases the Supreme Court shall have authority to review, in addition to other questions of law, errors assigned to the effect that there is a lack of substantial evidence to sustain a finding of fact; or that there is a failure to make any finding of fact on a material issue.

(c) All judgments and decrees of the Court of Claims shall be subject to review by the Supreme Court as provided in this section, and not otherwise."

It can be seen from a reading of this old act that by its terms specific statutory authority is given to the Supreme

Court to treat a case brought up under it virtually as a writ of error and not as a writ of certiorari as such a writ is generally known in the law.

This has all been changed by section 1255 of the Code first above quoted with the result that the case at bar must be considered under the principles of law generally applicable to such writs.

One of these principles is that the facts as found by the lower Court are final and binding on this Court, and that this Court is only concerned with questions of law.

It was so held in *U. S.* v. *Esnault & Pelterie,* 303 U. S. 26, 82 L. Ed. 627.

In that case which went up from the Court of Claims the Court held that review by the United States Supreme Court of a judgment of the Court of Claims in a suit against the United States for the infringement of a patent is limited to questions of law.

To the same effect is the case of *U. S.* v. *Causby,* 328 U. S. 256, 90 L. Ed. 1206, where the court, through Mr. Justice Douglas, refused to consider the evidence in the case to supplement the findings of fact. He said "That was not our function."

Further Rule 41, par. 3, of the Rules of the Supreme Court, covering such petitions, recognizes this rule. There it is provided that:

> "The same general considerations will control in respect of petitions for writs of certiorari to review judgments of the Court of Claims as are applied to applications for such writs to other courts. (See par. 5 of Rule 38)."

Rule 38, par. 5, which deals with reviews of writs of certiorari in general, is by this rule made applicable to petitions for writs of certiorari to the Court of Claims. This paragraph is as follows:

> "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important

reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

(b) Where a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter; or has decided an important question of local law in a way probably in conflict with applicable local decisions; or has decided an important question of federal law which has not been, but should be, settled by this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

This rule sets up the principle that the issuance of such a writ is not a matter of right but of sound discretion to be granted only where there are special and important reasons therefor and these reasons are restated as follows:

"(a) Where the lower court has decided an important question of federal law which the Supreme Court has not decided or in a way which is probably in conflict with decisions of the Supreme Court.

(b) Where the lower court has decided an important question of local law in a way probably in conflict with applicable local decisions.

(c) Where the lower court has decided an important question of federal law which has not been, but should be, settled by this court.

(d) Where the lower court has so far departed from the accepted and usual course of judicial procedure, or sanctioned such departure by a lower court as to call for the exercise of the power of supervision by the Supreme Court"

An examination of the facts in the case at bar will clearly show that none of these reasons are present and therefore there is no basis for asking this court to grant a writ of certiorari which is an extraordinary remedy applicable to extraordinary situations. These facts, briefly stated, are as follows:

In payment of a bill for materials purchased the Navy Department on December 19, 1946, sent a check for $14-005.30 to The Haneel Co. This check was delivered to one Bischoff, an employee of Haneel, at the direction of The Haneel Company. The Haneel Company had a bank account with The Security-First National Bank of Los Angeles and Haneel had filed written authorization with that bank dated February 25, 1946, authorizing it to "accept the endorsement The Haneel Company, Tri Vision Sales Agency. By Ed. A. Bischoff on any checks or other items payable to me or my order, and to pay to said Ed. A. Bischoff the amount represented by any such items or to deposit such items to his personal account or to any account he may direct." Bischoff at first traded under the fictitious name of Tri Vision Sales Agency and later, in May 1946, this name was changed to Tri Vision Sales Company with the knowledge and at the suggestion of responsible officers of The Haneel Company.

The Haneel Company in this authorization then agreed to hold the bank harmless against any damage or expense to which it might be put by reason of its acting under the authorization. The authorization was signed by The Haneel Co. by one of its owners and was in effect when the transaction here involved took place. Bischoff handled the camera business for The Haneel Company.

On April 15, 1946, the Haneel Co. made a general assignment to the petitioner but the petitioner did not notify the defendant bank or the Navy Department, of his appointment, and neither of them had any knowledge of his appointment prior to the transaction here involved, and the aforesaid check was delivered to the office of Bischoff on

the instructions of The Haneel Co. through its officer and agents. When the check was received Bischoff was not at his office but an associate of his named James V. Keys opened the mail and received the check. He called Bischoff on the phone and Bischoff instructed him to endorse the check and deposit it to the credit of Tri Vision Sales Company. Keys endorsed the check "The Haneel Company, by James V. Keys, co-owner. Pay to the order of Security-First National Bank of Los Angeles. Tri Vision Sales Company." The check was deposited in the Security-First National Bank of Los Angeles and was credited to the account of Tri Vision Sales Company. In due course the Bank of Hawaii on which the check was drawn paid the Security-First National Bank the amount of the check and charged the amount to the account of the United States in the Bank of Hawaii.

The suit was brought against the United States on the ground that the plaintiff had not been paid. The United States had the Bank of Hawaii made a third party defendant.

From the above statement it will appear that this case involves the simple question as to the liability of a bank in connection with paying out funds on deposit with it. There is not even any charge here that the decision of the Court of Claims creates an important conflict of opinion either with this Court or with a High State Court.

The rule is well settled that while the power to issue the writ is a comprehensive one it is to be exercised only in cases of substance and importance. This rule has been stated and approved in many Supreme Court cases.

In *United States* v. *U. S. F. & G. Co.*, 309 U. S. 506, 84 L. Ed. 894, the writ was granted because of the importance of clarifying the meaning of the language in a decision of the Supreme Court relating to the judicial ascertainment of the indebtedness of the government or striking a balance against the United States where cross claims are involved.

In *In re Woods*, 143 U. S. 202, 36 L. Ed. 125, it was held that whether the law of a state to the effect that a judgment of dismissal was not a bar to a second suit for the same cause of action, and whether the law in respect of recovery by a servant against his master for injuries received in the course of his employment were properly applied on the trial of a case, are not questions of such gravity and importance as to require review by certiorari.

In *International R. Co.* v. *Davidson*, 257 U. S. 506, 66 L. Ed. 341, it was held that:

> "The question of the validity of a treasury ruling under which the continuance of customs inspection service on Sundays and holidays at the American end of international toll bridges is conditioned upon the payment by the bridge owner of the extra cost of the inspection service on those days, and the giving of an indemnity bond to the United States, covering any resultant losses to the government, is of sufficient importance to justify the granting of certiorari from the Federal Supreme Court to a Circuit Court of Appeals in a case presenting such question."

In *Re Law Qu Ben*, 141 U. S. 585, 35 L. Ed. 686, it was held:

> "A judgment involving the effect of Chinese restriction acts upon Chinese merchants domiciled in this country, who temporarily leave it animo revertendi, and also the effect of our treaties with China, is a proper case for a writ of certiorari requiring it to be certified to the Supreme Court of the United States for review."

In the case of *U. S.* v. *Causby*, 328 U. S. 256, 90 L. Ed. 1206, the court said:

> "The case is here on petition for a writ of certiorari because of the importance of the question involved."

The question involved was whether or not the government is liable for the taking of private property for public

use in the operation of an airport leased to the government for the use of its planes if such use interferes with the use of private property.

It will readily be seen that here was involved an important public question of first impression.

In the case of *J. I. Case Co.* v. *National Labor Relations Board,* 321 U. S. 332, 88 L. Ed. 762, Mr. Justice Jackson in the opinion of the Court said:

> "The issues are unsettled ones important in the administration of the Act and we granted certiorari."

This case involved the construction of the National Labor Relations Act.

There are many other cases in the Supreme Court sustaining the position that to warrant certiorari a case must involve questions of substance and public importance.

While we are convinced that this is not a case which warrants the issuance of a writ of certiorari yet we think the Court of Claims was right in deciding that the Plaintiff had no case on the facts for the following reasons:

2.

Objection to Form of Endorsement.

The petitioner objects to the indorsement because it was made by Tri Vision Sales Company whereas the authorization card provided that it should be made by the Tri Vision Sales Agency.

This contention is entirely without merit. The court below in its findings of fact No. 4 says: "On April 30, 1946, because of certain complications which arose due to the imposition of an excise tax on cameras and the operations under O.P.A., at the suggestion of Mr. Nathan O. Halsey and Mr. Cliff Campbell, comptroller of the Haneel Company, Bischoff organized a firm known as "Tri Vision Sales Company" at 2154 Hyde Park Boulevard, Los Angeles, California. The firm continued without substantial change

the sales and distribution of Haneel cameras and related items which had previously been carried on in the name of The Haneel Company, Tri Vision Sales Agency. Neither Tri Vision Sales Agency nor Tri Vision Sales Company was incorporated. Both were fictitious name firms of which Ed. A. Bischoff was the sole proprietor". (Findings of Fact No. 4, second paragraph). The plaintiff as assignee of the Haneel Company was fully aware of this change in name. He dealt as assignee with Tri Vision Sales Company and entered into a written agreement with it on May 23, 1946. (P. 7, Findings of Fact and Opinion of Court below).

It is thus apparent that the name Tri Vision Sales Agency was used for only a few months and was changed to Tri Vision Sales Company at the suggestion of the responsible officers of The Haneel Company and that the change in name was well known to petitioner.

The court below held in its opinion that "For all intents and purposes Ed. A. Bischoff, Tri Vision Sales Agency and Tri Vision Sales Company are the same entity" (Opinion Court below, p. 7).

3.

The Endorsement is Not a Forgery.

The petitioner calls the endorsement made by Keys a forgery. It has not one element of forgery in it. It was authorized by Bischoff who had the authority to do so.

The indorsement by Keys is valid under Section 3100 of the California Code of Civil Procedure which reads:

> "Signature by agent. Authority: How shown. The signature of any party may be made by duly authorized agent. No particular form of appointment is necessary for this purpose; and the authority of the agent may be established as in other cases of agency."

It clearly appears that Bischoff was authorized by the authorization card of February 25, 1946, to indorse the

name of The Haneel Company to checks and, having this authority, he had the right to authorize Keys to do so under this statute.

Both Bischoff and Keys testified that Bischoff expressly directed Keys to indorse this check and deposit it to the credit of Tri Vision Sales Company.

Furthermore the Keys indorsement is not of vital importance because the Authorization Card of February 25, 1946 signed by The Haneel Company (Comm. Finding No. 5) authorized the bank "to pay to said Ed A. Bischoff the amount represented by any such items or to deposit such items to his personal account or to any account he may direct; and I agree to hold you harmless against any damage or expense to which you may be put by reason of your acting under this authority."

Can it possibly be contended that this is not a valid transfer of title under this authorization? The check was deposited where the Haneel Co. directed it should be deposited.

The following authorities are cited in support of this point:

In American Jurisprudence (para. 332, P. 67) the rule is stated as follows:

> "It is clear that an instrument can be transferred by its owner, or his duly authorized agent. It can be negotiated by bearer if it is negotiable by delivery, and by the holder or his duly authorized agent if it is negotiable by endorsement. No particular form of appointment is necessary for the purpose, and the authority of the agent may be established as in other cases of agency."

It is well recognized that an Agency can be established by express agreement, by implication, or by deduction or inference from other facts and circumstances. As a matter of fact it is largely a question of intent of the parties.

In the case of *Farmington State Bank* v. *George W. Delaney, et al.*, 46 A. L. R. 1494, it was held that an unqualified indorsement of a promissory note, by means of a rub-

ber stamp, is sufficient, and satisfies the requirements of the statute, if made by someone having authority to do so.

In the case of *Quanah etc. R. R. Co.*, 106 A. L. R. 821, it was held that a bank becomes a purchaser of bills of exchange for a valuable consideration by crediting the proceeds to the sellers deposit account.

It also held that a negotiable instrument passes as a species of currency without inquiry; and if the buyer pays a valuable consideration and acts in good faith his title cannot be impugned.

In *Fidelity Gas Co.* v. *First National Bank and Trust Co.*, 1 Nev. 2nd 401, 71 N. D. 415, it was said:

> "As between a payee of checks and a bank which cashed them in reliance on ostensible authority of payee's agent to indorse them, payee cannot be heard to say that indorsements were forgeries or unauthorized.
>
> Ostensible authority of one cashing checks at bank to indorse payee's name thereon was sufficient to pass title thereto to bank."

In *McLeod State Bank* v. *Vandimark*, 51 N. D. 573, 200 N. W. 42, it was held that the authority of an agent may be shown by parol notwithstanding a statute requiring written authority to make a contract required by law to be in writing.

In *Quality Car Co.* v. *Corkill*, 182 Ill. App. 17 F., it was held "Generally, no particular form of appointment is necessary to authorize a person to indorse a promissory note as agent."

In *Arcade Realty Co.* v. *Bank of Commerce*, 181 Pac. 66, Arcade Realty Co. owned certain real estate and a man named Clement was its agent to collect the rents and had been for some years. He had collected rents from the tenants and had deposited the moneys or checks received, in his own bank account, to his personal credit and had remitted such rentals to the Arcade Co. in San Francisco by checks drawn against such personal account. Rents of

$1000 per month from a company known as The Hotel Arcade, however, were paid by the tenant Philips direct to the Arcade Co. by his personal check until February, 1912. Philips, however, failed to pay the rent promptly under this arrangement and in order to facilitate collection the Arcade Realty Co. directed Clement to collect such rentals. Beginning February 23, 1912 Clement collected a check from Philips payable to the order of Arcade Realty Co. and mailed the same to it. Thereafter, Clement collected the 64 checks in issue at intervals until May 29, 1913. Each of these checks was endorsed by Clement as follows: "Arcade Realty Co. by A. W. Clement, Agent, A. W. Clement" and deposited in his personal account. The checks were paid by respondent Bank in due course. Clement remitted these rents and other rents collected by his personal check. In June, 1913, the Arcade Co. discovered that Clement had remitted $650 less than he had collected up to that date. Nevertheless it did nothing about the matter than instruct Clement thereafter to remit the Philips checks direct to it, which Clement did.

On Clements' death several months later, Arcade Realty Co. discovered that Clement, during the period when he was depositing the Philips rent to his account had been making the indorsements in question for such purpose. The court held that the Arcade Realty Co., on receiving from month to month the personal check of its agent in satisfaction of rentals collected, must have been aware of the fact that Clement was depositing all rents in his personal account thus by implication must have approved such deposit.

The court said:

"When the principal permitted its agent to deposit collections to his personal account to be transmitted by his personal check, it is a fair, if not a necessary, inference that he had the authority to make such indorsements as were necessary to do this.

Where a principal gave an agent, making collections, authority to deposit all rents collected by him in his personal account for the purpose of remitting the same by his personal check, the authority carried with it power to indorse for deposit checks made payable to principal, where such were collected."

4.

Authorization to Bank on Endorsement.

The plaintiff assumes, in his argument throughout this case, that the authorization from The Haneel Company to the Security First National Bank dated February 25, 1946 (Finding of Fact No. 5) applied only to the 49th and Western Branch of that bank and not to other branches. However an examination of this authorization card will show that it is not addressed to any branch but to the Security First National Bank and therefore applied to all branches. This authorization card was not revoked until September 11, 1947.

He also undertakes to get some comfort from the fact that the defendants did not put any witness on the stand to testify that the bank relied on this authorization. This is an amazing position. The findings of fact show that this authorization was dated February 25, 1946; was signed by one of the owners of The Haneel Company and delivered to the bank where the company had an account. This is, of course, the universal method of instructing a bank as to the procedure applicable to the payment of checks on funds deposited. It speaks for itself and there is certainly no reason why the bank should, by oral testimony, show that it relied on the instructions in the authorization in complying with such instructions.

A bank is bound to comply with such instructions as long as they are effective and it did so in this case. As above stated this authorization card was fully effective until it was revoked on September 11, 1947.

5.

Authorization of Bischoff to Endorse.

The petitioner contends that after the assignment from The Haneel Company to him on April 15, 1946, Bischoff had no actual authority to endorse checks made payable to the Haneel Company because his authority was terminated by operation of law.

Petitioner argues that under the authority given, Bischoff could endorse plaintiff's check and legally receive the proceeds thereof provided he wrote across the back of the check "Tri-Vision Sales Agency, by Ed. A. Bischoff", but that he could not legally receive the proceeds of the check if his endorsement read "Tri-Vision Sales Company, by Ed. A. Bischoff". This statement is wholly inaccurate. The intent of the Haneel Company was to give Ed A. Bischoff, its sales agent, the right to receive and cash Haneel Company checks. As noted the bank was expressly authorized by The Haneel Company to pay the proceeds of The Haneel Company checks to "Ed. A. Bischoff" or to deposit the money in whatever account "he may direct." In view of this broad authority no one was damaged, or could have been damaged if the effect of any endorsement whatsoever was to transfer the funds to Ed. A. Bischoff. The Tri-Vision Sales Agency was Ed. A. Bischoff. The Tri-Vision Sales Company, the successor of the Tri-Vision Sales Agency, was Ed. A. Bischoff; and both the "agency" and the "company" were engaged in the sale of The Haneel Company products. Whether the endorsement read "agency" or "company", the fact remains that Ed. A. Bischoff received the money. We believe the plaintiff might as logically contend that if it authorized Homer X. Jones to cash its check, the endorsement would be fraudulent if Mr. Jones signed his name "H. X. Jones."

Plaintiff further contends that the endorsement is fraudulent because Mr. Keys, a partner of Mr. Bischoff, endorsed the check with the words "co-owner." Where is the fraud? Who was cheated? Did Mr. Keys get the money intended for Mr. Bischoff? Did the legal rights or

liabilities of The Haneel Company change in any microscopic particular by virtue of the fact that Mr. Keys endorsed the check instead of Mr. Bischoff? The answers to these questions are uniformly and unquestionably in the negative. Mr. Keys simply endorsed the check as agent for Mr. Bischoff and the money went into Mr. Bishoff's account. Under such circumstances there was no fraud.

On this point the court below on page 9 of its opinion said:

"Plaintiff's petition must be dismissed. At the time the Navy check was deposited with the Security-First National Bank, Bischoff had either real or (as far as the bank was concerned) ostensible authority to do so. The act of Keys was the act of Bischoff. The check was mailed to The Haneel Company and delivered, in accordance with the instructions of responsible agents of that company, to Bischoff who dealt with it in accordance with the written authorization of The Haneel Company. The Security-First National Bank became a holder in due course and the instrument was paid in due course of business. If there was a diversion of funds within the Haneel organization, the proper defendant is not before this court.

The foundation of our decision is that Bischoff, on the day the Navy check was deposited in the Tri-Vision Sales Company account, was the real or ostensible agent of plaintiff; that Keys (who actually endorsed the check) was the agent of Bischoff; and that there was, thus, no forgery."

In reference to this question the Court found the facts in Findings of Fact No. 8 on Page 4 of Special Findings of Fact above recited.

If the petitioner had shown the slightest bit of care or discretion by sending notice of his appointment to the Navy Department and to the bank this suit would not be in this Court now. If such notice had been sent to the Navy Department unquestionably it would have sent the check to the petitioner as assignee and if such notice had been sent

to the bank it would certainly have paid out funds in the Haneel account as directed by the petitioner as assignee. The court below said on this point:

"Upon the date that MacNeel Pierce delivered written authorization to the Security-First National Bank allowing Bischoff to endorse and deal with checks payable to The Haneel Company, there was no doubt that Bischoff was the general agent of The Haneel Company, empowered to endorse in blank and to deposit to his own or to any other account the proceeds of any item drawn in favor of The Haneel Company. In theory, at least, Bischoff's agency was terminated by the assignment to the present plaintiff. However, Bischoff's apparent agency was not so terminated. *Restatement of Agency,* Sec. 108, Comment a. Further, Warfel, the assignee, retained Bischoff in his accustomed role, and neglected, for a considerable period, to notify anyone except creditors and taxing authorities of the assignment. Whatever advantages plaintiff might have gained by following the statutory provisions for the recordation of assignments we need not determine since he contented himself with a common-law assignment. While we do not question the legality of such an assignment in California, it is apparent that one who follows such a course bears the risk of notifying interested parties. No convincing evidence has been presented that the Security-First National Bank or any of the parties now before the court had notice of Haneel's assignment to Warfel. We are thus of the opinion that Bischoff became the assignee's agent and that as far as the bank was concerned possessed at least apparent authority to transact business in the same manner as before the assignment. Buttressing this view is the fact that Warfel, although in control of Haneel's operations for more than eight months before the encashment of the Navy check, took no step to cancel Bischoff's authority with the bank or to stop the forwarding of Haneel mail to Bischoff. It is evident to us that plaintiff either (1) approved of and acquiesced in this manner of doing

business, or (2) by his own negligence made the fraud (if any) complained of possible. California recognizes the familiar rule of law that where one of two innocent persons must suffer, the loss should be borne by him whose acts made the loss possible. *Safeway Stores, Inc.* v. *King Lumber Co.*, 113 P. 2d 483, 486 (Cal. App., 1941)."

Under the facts in this case, the petitioner must stand any loss that may have been caused by the endorsement appearing on this check and its deposit to the account of the Tri Vision Sales Co.

We, therefore, respectfully submit that the petition for certiorari filed herein should be denied.

WATTERS AND DONOVAN,
By: ABNER H. FERGUSON.

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